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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 KEVIN M.,

7 Plaintiff,

8 v.

9 COMMISSIONER OF SOCIAL
SECURITY,

10 Defendant.

Case No. C19-125 TLF

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

11 Plaintiff has brought this matter for judicial review of defendant's denial of his
12 applications for disability insurance and supplemental security income benefits. The
13 date of onset was found to be August 1, 2014. AR 21.

14 The parties have consented to have this matter heard by the undersigned
15 Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule
16 MJR 13. As discussed below, the undersigned agrees that the ALJ erred and the ALJ's
17 decision is reversed and remanded for further administrative proceedings.

18 I. ISSUES FOR REVIEW

19 1. Did the ALJ err in assessing plaintiff's impairments by omitting plaintiff's
20 headaches and vertigo?

21 2. Did the ALJ err in evaluating Plaintiff's subjective allegations?
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2 II. DISCUSSION

3 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
4 denial of social security benefits if the ALJ's findings are based on legal error or not
5 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427
6 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
7 1999)).

8 A. Headaches and Vertigo

9 The ALJ did not find plaintiff's vertigo and headaches to be a medically
10 determinable impairment at step two of the sequential evaluation. AR 21. Plaintiff
11 contends that this omission is error. Dkt. 10, at 3. Alternatively, plaintiff argues that the
12 ALJ erred by failing to include the limitations attributable to these impairments in the
13 RFC finding. *Id.*

14 At step two, the "medical severity" of a claimant's impairments is considered. 20
15 C.F.R. 404.1520(a)(4)(ii), § 416.920(a)(4)(ii). An impairment is not considered to be
16 "severe" if it does not "significantly limit" a claimant's mental or physical abilities to do
17 basic work activities. *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). A plaintiff
18 has the burden to show (1) he has a medically determinable impairment or combination
19 of impairments; (2) the impairment or combination of impairments is severe; and (3) the
20 impairment lasted at least 12 months. See *Bowen v. Yuckert*, 482 U.S. 137, 146,
21 (1987); 20 C.F.R. § 404.1520(c), 416.920(c).

22 The ALJ stated that plaintiff's vertigo had no clear etiology, that it improved
23 following physical therapy, and that plaintiff was no longer having vertigo by May 2016.
24 AR 22-25. The ALJ claimed that plaintiff's headaches were controlled with vitamins and
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1 a prednisone taper. AR 23. Finally, the ALJ pointed to a normal cervical spine and brain
2 MRIs to conclude there was a lack of objective findings to explain plaintiff's headaches
3 or vertigo. AR 25. The Court infers that the ALJ concluded these conditions to have
4 insufficient medical evidence to prove any significant work-related limitations.

5 The Court agrees the ALJ should have found vertigo and migraines to be severe
6 impairments at step two, based on substantial evidence. Ample evidence shows the
7 vertigo "medically determinable" because Dr. Callendar initially diagnosed plaintiff with
8 vertigo as a related condition to plaintiff's acute bacterial sinusitis in March 2015 (AR
9 533), plaintiff's vertigo did not resolve after his bacterial sinusitis was successfully
10 treated (AR 543), plaintiff was observed to experience vertigo sensations when tested
11 by Dr. Callendar, Dr. Shergill, Dr. Kurth, and Dr. King (AR 455, 543, 574, 581), and
12 plaintiff received prescription medication and underwent physical therapy for his
13 condition (AR 433, 517, 543, 586, 590, 618, 620, 642, 648).

14 Likewise, plaintiff's headaches are a medically determinable impairment,
15 because he has received multiple diagnoses for his chronic headaches and migraines
16 (AR 518, 572, 599, 619), and his headaches have resisted treatment by various
17 prescription medications and Botox injection (AR 620, 641, 642, 649).

18 The record indicates that, despite unknown etiology, plaintiff regularly received
19 treatment and pursued follow-up for both these conditions over the course of the
20 relevant period. Furthermore, plaintiff's longstanding diagnosis of fibromyalgia offered a
21 possible objective cause for these conditions throughout the relevant period. See SSR
22 12-2p. Plaintiff's vertigo improved, but was not ultimately resolved following physical
23 therapy, as on exit Dr. Kurth assessed plaintiff's remaining dizziness and headaches as
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1 limiting him to 50% functionality, based on plaintiff's lingering risk of falling from his
2 dizziness handicap and severe motion sensitivity. AR 596, 602. Plaintiff's treatment
3 notes indicate that his vertigo returned within six weeks after physical therapy, upon
4 which he was started on new medication. AR 618. The vitamins and prednisone taper to
5 which the ALJ refers were accompanied by the introduction of Depakote, followed by
6 Cataflam, as plaintiff's headaches still occurred 4 to 5 times per week. AR 648.

7 Substantial evidence therefore cannot support the ALJ's conclusion that plaintiff's
8 alleged impairments were well-controlled by minimal medication or that objective
9 findings did not support their existence. The record shows vertigo and headaches are
10 medically determinable conditions, lasted at least 12 months, and more than minimally
11 affects plaintiff's ability to perform work activities. Accordingly, the ALJ erred by not
12 finding vertigo or headaches to be severe medical impairments.

13 If the ALJ considers an impairment's effect on a claimant's ability to do work
14 activities *and* includes those limitations in the RFC, the omission of the impairment from
15 the step two evaluation constitutes only harmless error. *See Molina v. Astrue*, 674 F.3d
16 1104, 1115 (9th Cir. 2012); *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017). The
17 ALJ discussed plaintiff's vertigo and headaches as part of his discussion of plaintiff's
18 limitations. AR 23. As such, had the ALJ included any limitations associated with
19 plaintiff's vertigo and headaches, the error of omission at step two would likely be
20 harmless.

21 Yet the ALJ failed to include any limitations based on vertigo and headaches.
22 The ALJ must consider *all* limitations and restrictions when formulating the RFC, even
23 those stemming from impairments that are not "severe." *See Buck v. Berryhill*, 869 F.3d

1 at 1049; 20 C.F.R. § 404.1520(e). On this record, the ALJ's determination that plaintiff's
2 migraines and vertigo were well-controlled or resolved with medication is not supported
3 by substantial evidence. The medical evidence from the relevant period suggests, at the
4 very least, that Plaintiff experienced impacts on standing, sitting, walking, and balancing
5 due to his headaches and vertigo. The ALJ erred by failing to consider the limitations
6 imposed by plaintiff's vertigo and migraines in formulating plaintiff's RFC. Accordingly,
7 the Court concludes that the ALJ's failure to include vertigo and headaches among
8 plaintiff's severe impairments and failure to include the limitations associated with these
9 conditions was harmful error.

10 B. The ALJ's consideration of plaintiff's testimony

11 Plaintiff asserts the ALJ erred by discounting plaintiff's testimony regarding the
12 functional limitations of his impairments.

13 In weighing a plaintiff's testimony, an ALJ must use a two-step process. *Trevizo*
14 *v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017). First, the ALJ must determine whether
15 there is objective medical evidence of an underlying impairment that could reasonably
16 be expected to produce some degree of the alleged symptoms. *Ghanim v. Colvin*, 763
17 F.3d 1154, 1163 (9th Cir. 2014). If the first step is satisfied, and provided there is no
18 evidence of malingering, the second step allows the ALJ to reject the claimant's
19 testimony of the severity of symptoms if the ALJ can provide specific findings and clear
20 and convincing reasons for rejecting the claimant's testimony. *Id.* See *Verduzco v.*
21 *Apfel*, 188 F.3d 1087, 1090 (9th Cir. 1999) (inconsistent testimony about symptoms is
22 clear and convincing reason to discount subjective allegations).

1 The ALJ is required to state what testimony he or she determined to be not
2 credible and point to the evidence that undermines the plaintiff's credibility. *Dodrill v.*
3 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Although the Court upholds an ALJ's findings
4 when they are supported by inferences reasonably drawn from the record, *Batson v.*
5 *Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004), the ALJ must
6 actually state such inferences to give a cogent explanation. The ALJ needs to make
7 findings sufficiently specific to allow this Court to conclude that the ALJ rejected the
8 testimony on permissible grounds and did not arbitrarily discredit the claimant's
9 testimony. *Rollins v. Massanari*, 261 F.3d 853, 856-57 (9th Cir. 2001).

10 Here, the ALJ found that the objective medical evidence could reasonably be
11 expected to produce some of plaintiff's symptoms, but discounted plaintiff's testimony
12 regarding the extent of the symptoms arising from his impairments for the following
13 reasons: (1) plaintiff's impairments improved with exercise and conservative treatment;
14 (2) plaintiff's complaints were undermined by a lack of significant treatment and an
15 extended period of time in which plaintiff avoided medication; and (3) plaintiff's claims of
16 debilitating symptoms were not supported by the objective medical evidence in the
17 record. AR 23-25. These reasons do not meet the clear and convincing standard.

18 First, the ALJ's determination that plaintiff's conditions were controlled by
19 conservative treatment is not supported by substantial evidence. As discussed above,
20 plaintiff's physicians, including Dr. King, a specialist in neurology, concurrently
21 prescribed multiple medications for his conditions of fibromyalgia, vertigo, and
22 headaches. See, e.g., AR 543, 590, 618, 642; compare *Davis v. Colvin*, 2015 U.S. Dist.
23 LEXIS 120329, 2015 WL 5255353, at *11 (E.D. Cal. Sept. 9, 2015) (affirming ALJ's

1 conservative treatment finding where plaintiff had *not* been referred to a pain specialist).
2 These medications, which were frequently swapped for new medications when shown
3 to be ineffective or to cause unacceptable side effects, did not control plaintiff's
4 symptoms. AR 620, 648. In any case, the ALJ did not explain what additional "non-
5 conservative" treatment plaintiff might be expected to receive.

6 Second, the record does not support the ALJ's claim that plaintiff went a
7 "extended period of time" without treatment or medication. The ALJ's decision appears
8 to refer to six months during which plaintiff was between medications for another of his
9 impairments (fibromyalgia), but also actively pursuing physical therapy and taking
10 medication for his vertigo and headaches. AR 25, 592, 599, 622. Yet the record does
11 not include any periods during which plaintiff was not pursuing treatment of some kind
12 for his chronic conditions.

13 Finally, the ALJ lacked support for his conclusion that objective findings did not
14 support the degree of functional limitations plaintiff alleged. While the ALJ cited imaging
15 results and neurological findings—such as normal gait, range of motion, and straight leg
16 raising tests—these findings do not undermine plaintiff's claims of pain, dizziness, and
17 resulting limitations, which the record suggests are due to fibromyalgia and migraines --
18 conditions that would not result in abnormal imaging or neurological findings. AR 24;
19 *see Ghanim v. Colvin*, 763 F.3d 1154, 1164 (9th Cir. 2014) (ALJ may not "cherry-pick[]"
20 items from treatment record without considering them in context of "diagnoses and
21 observations of impairment"); *see also Revels v. Berryhill*, 874 F.3d 648 (9th Cir. 2017)
22 (noting that those suffering from fibromyalgia have normal muscle strength, sensory
23 functions, and reflexes, and their joints appear normal).). Additionally, since the Court
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1 has rejected the ALJ's other reasons to discount plaintiff's testimony, the ALJ may not
2 reject plaintiff's subjective symptom testimony "*solely* because the degree of pain
3 alleged is not supported by objective medical evidence." *Orteza v. Shalala*, 50 F.3d 748,
4 749-50 (9th Cir. 1995) (internal quotation marks omitted and emphasis added); *Byrnes*
5 *v. Shalala*, 60 F.3d 639, 641-42 (9th Cir. 1995) (applying rule to subjective complaints
6 other than pain).

7 The ALJ erred in discounting plaintiff's testimony and should fully consider it on
8 remand.

9 C. Remand With Instructions for Further Proceedings

10 The Court may remand a case "either for additional evidence and findings or to
11 award benefits." *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when
12 the Court reverses an ALJ's decision, "the proper course, except in rare circumstances,
13 is to remand to the agency for additional investigation or explanation." *Benecke v.*
14 *Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). The Court has
15 determined that on remand the ALJ must re-evaluate plaintiff's impairments at step two
16 (headaches and vertigo), plaintiff's testimony, and the RFC. Therefore, there are
17 outstanding issues which must be resolved and remand for further proceedings is
18 appropriate.

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7 CONCLUSION

8 Based on the foregoing discussion, the Court finds the ALJ erred when he
9 determined plaintiff to be not disabled. Defendant's decision to deny benefits therefore
10 is REVERSED and this matter is REMANDED for further administrative proceedings.
11 The ALJ is directed to re-evaluate plaintiff's impairments at step two (headaches and
12 vertigo), plaintiff's testimony, and the RFC.

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14 Dated this 31st day of January, 2020.

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Theresa L. Fricke
18 United States Magistrate Judge
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